Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE E. GARDNER,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.

Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The district court dismissed plaintiff's 44 count complaint pursuant to Fed.R.Civ.P. 12(b) and 41(b). The appellant court declined to review the appealed Rule 41(b) dismissal. The Rule 12(b) dismissals did not dispose of all claims with respect to all the parties. The appellate court accepted subject matter jurisdiction over the Rule 12(b) dismissals as if it was a final judgment disposing of all the claims and all the defendants.

Whether the appellate court pursuant to 28 U.S.C.§ 1291 and §1291(a) lacked subject matter jurisdiction to review the Rule 12(b) dismissals because a final Rule 12(b) judgment on all claims with respect to all defendants had not been rendered by the district court and it declined to rule on the Rule 41(b) dismissal?

2. The appellate court summarily affirmed the district court's Fed.R.Civ.P.12(b)(1) and (6) dismissals of the MSPB and two MSPB employees, sued in their individual capacity, "[b]ecause the district court correctly dismissed these three counts on the merits."A2. The lower courts' decisions are in direct conflict with this court's decision in *Conley v. Gibson, 355 U.S. 41 (1957), Scheuer v. Rhodes, 416 U.S. 232 (1994), Bell v. Hood, 327 U.S. 678 (1946), and Celotex Corp v. Catreet, 477 U.S. 317 (1985).*

Whether the district court failed to adhere to binding precedent of this Court, acted prematurely, and hence erroneously when it dismissed plaintiff's claims on the merits prior to an answer or discovery, thus precluding plaintiff any opportunity to establish his claims by subsequent proof?

3. Whether the lower courts are bound by this Court's decision in *Gutierrez De Martinez v. LaManagno, 515 U.S. 417 (1995)* which held a certification provided by the Attorney General that federal employees were acting within the scope of their employment is **not** conclusive on that issue and their reluctance to follow the ruling of this Court resulted in the premature Rule 12(b)(1) dismissal of plaintiff's claim without affording him the opportunity to present evidence on this issue?

4. The appellate court decided genuine issues of material fact that were not addressed by the district court nor appealed to the appellate court. The appellate court decided contested factual issues against the plaintiff and then summarily affirmed the district court's Rule 12(b)(6) dismissals.

When genuine issues of material fact exist, an appellate court should not unilaterally decide those issues and then summarily dispose of the appeal, thereby, precluding appellant of the opportunity to fully brief his case?

PARTIES TO THE PROCEEDING

Petitioner

BRUCE E. GARDNER

Respondents[1]

U. S. MERIT SYSTEMS PROTECTION BOARD

BEN L. ERDREICH

ANTONIO C. AMADOR[2]

1, The United States of America is representing the U.S. MSPB and has substituted itself for Ben L. Erdreich and Antonio C. Amador.

2. The following defendants were named in the original action but are not part of this appeal because the appellate court has not decided all the relevant issues. The United States of America, The Department of The Treasury, Internal Revenue Service, State of California, Franchise Tax Board, Neal O. Abreu, Steven J. Mopsick, Robert J. Wilson, Albert Larson, III, Benjamin C. Sanchez, Dennis A. Quinn, Frank Stokes, William Reitan, Helen F. Jamison, and Stacia Greaux.

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Gardner v. United States of America, et al.
96 CV 1467 (D.C.D.C. 1999)

December 9, 1997- U.S. District Court *sua sponte* Order, holding "defendants are not required to file their answers until resolution of these dispositive motions".A14.

November 25, 1997- U.S. District Court Order, denying all Fed.R.Civ. P. 12(b) motions and directing parties to file all dispositive motions. A15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1). In addition, this Court has jurisdiction to determine whether the appellate court lacked subject jurisdiction to review the incomplete and non-final decisions of the district court..A17.

Jurisdiction also exists based upon the lower courts' failure to adhere to binding precedential decisions rendered by this Court in *Gutierrez De Martinez v. LaMangno, 515 U.S. 417 (1995), Scheuer v. Rhodes, 416 U.S. 232 (1994), Conley*

v. Gibson, 355 U.S. 41 (1985), Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and *Bell v. Hood, 327 U.S. 678 (1946).*

On August 4, 1999, the Court of Appeals for the District of Columbia summarily affirmed the U.S. District Court's dismissal of Counts I-A, I-B, and IV-A of plaintiff's complaint pursuant to Fed.R.Civ.P.12(b).[1] Privacy Act violations were alleged against the U.S. Merit Systems Protection Board (MSPB) in Count IV-A which were dismissed by the district court pursuant to Rule 12(b)(6). Counts I-A & I-B involved causes of action against two MSPB employees, sued in their individual capacities, which were prematurely dismissed for want of subject matter jurisdiction under Rule 12(b)(1) after the United States was substituted for the defendants. A1-2.

Plaintiff timely filed a petition for a rehearing and suggestion for en banc review with the D.C. Circuit on the dismissals which was denied on October 26, 1999.A16. This petition is filed within 90 days from the date the petition for rehearing was denied.

STATUTORY PROVISIONS INVOLVED

The authority relied upon includes the due process of law clause of the 5th Amendment, equal protection under the law, the statutes listed below, and the federal rules of civil procedure.

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[1]Hereinafter referred to as "Rule".

1) 28 U.S.C.§1291-- The court of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States...

2) Fed.R.Civ.P.12 **Defenses and Objections...**

(b) Every defense, in law or fact, to a claim for relief in any pleading, .., shall be asserted in the responsive pleading ..., except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter...,

(6) failure to state a claim upon which relief can be granted...

3). 5 USC §552a(g)(1) **Civil remedies.-**

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

© fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provision of this subsection.

4) 5 USC §552a(g)**(4)** --In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was **intentional or willful**, the U.S. shall be liable to the individual in an amount equal to the sum of -

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court. [emphasis added]

5). 26 U.S.C. §6103(a) **Confidentiality and disclosure of returns and return information.**

(a) **General rule.-**

Returns and return information shall be confidential, and except as authorized by this title.-

(1) no officer or employee of the United States;

(2) no officer or employee of any State, ..

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer and an employee...

6) 26 U.S.C. § 7431. **Civil damages for unauthorized disclosure of returns and return information.**

(a) In General.

(1) **Disclosure by employee of United States.**. If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any

provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

7). 28 U.S.C.§2679(d) (1) states-- Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a U.S. district court shall be deemed an action against the U.S. under provisions of this title and all reference thereto, and the U.S. shall be substituted as the party defendant.

STATEMENT OF THE CASE

Plaintiff filed a 44 Count complaint asserting claims of:

◆ knowingly, negligently, or wilfully wholesale unauthorized disclosures of his confidential income tax returns and tax return information by employees of the U.S. and the State of California;

◆ intentional or wilful Privacy Act violations by the Department of Treasury, IRS, MSPB; and

◆ *Bivens* type constitutional claims against 12 federal employees sued in their individual capacity.

I. Appellate Court Lacked Subject Matter Jurisdiction Over Partial District Court Rule 12(b) Dismissal of Some But Not All Claims or Defendants.

The district court failed to address any of the claims asserted in Count I concerning the unauthorized tax disclosures by Abreu (a Treasury employee), the wilful Privacy Act violations of Treasury and the IRS, or the *Bivens* type constitutional violations. In addition, Counts IA, IB, and IV.A which are the focus of this appeal[2], also asserted multiple claims against different defendants that were not all addressed by the district court. For example, Counts I.A and I.B assert claims for federal tax disclosure violations and *Bivens* type claim. However, the district court ignored the federal tax disclosure claims and only dismissed the *Bivens* type claims against the individual federal defendants under Rule 12(b)(1) solely because the U.S. was substituted for the defendants.

The district court also dismissed plaintiff's complaint for failure to prosecute with prejudice, based exclusively upon plaintiff's medical absence from the first motion hearing. Although a Rule 41(b) dismissal is a final decision on the merits, the appellate court declined to review this decision even though that was the only decision in which the appellate court had subject matter jurisdiction to review.

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[2] The appellate court granted a summary affirmance of the Rule 12(b) dismissal against the MSPB and federal employees, Erdreich, and Amador. The remainings claims asserted against the other defendants are still pending before the D.C.Circuit.

II. Rule 12(b) Dismissal Decided Merits of Claims..

Under the auspices of Rule 12(b)(1) and (6) , the lower courts denied plaintiff his right to present evidence on his claims by deciding the merits of his claims, which are not in issue in a Rule 12(b) motion. The district and appellate courts incorrectly decided the merits of plaintiff's claims and decided whether plaintiff would prevail on the merits of his claims at trial.

The scope of the lower courts' focus should have been limited to:

1 . Whether a prima facie case for a Privacy Act violation had been alleged against the MSPB.[Rule 12(b)(6)]. &

2. The district court's authority to decide U.S. Constitutional and defamation claims against federal employees acting outside the scope of their employment. [Rule 12(b)(1)].

Instead, the lower courts relying on a D.C. Circuit opinion involving the denial of medicare reimbursement benefits subject to review under the Administrative Procedures Act , [3] incorrectly decided plaintiff would not ultimately prevail on the merits of his claims. The lower courts ignored this

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[3] *Marshall Co Health Care Authority Shala, 988 F.2d 1221, 1226 (D.C.Cir.1993).*

Court's binding decisions in *Conley*[4] *and Scheuer*[5] which directly addressed the issues presented to the lower courts.

In essence, the lower courts pre-judged the outcome of Gardner's claims by incorrectly making factual determinations on genuine issues of material fact without affording him the opportunity to present his evidence,i.e. denial of due process.

III. Claims for Relief Under The Privacy Act Have Been Alleged & Plaintiff Is Entitled To Offer Proof On His Claims.

Plaintiff filed a complaint against the MSPB for "willfully or intentionally" violating his statutory right to privacy under 5 U.S.C. §552a and demanded a jury trial. A19-30. Paragraphs 100g-k of the complaint specifically reference sections of the Privacy Act that were violated and it expressly states the MSPB acted "willfully or intentionally". A20,29-30. The MSPB never placed these allegations in issue by answering the complaint but instead filed a Rule 12(b)(6) motion to dismiss for failure to state any claim for which relief could be granted.

On November 25, 1997, the district court dismissed the MSPB's Rule 12(b)(6) motion. The MSPB filed the exact same motion again, despite the establishment of the "law of the case" by the court's November 25th decision. The court granted the MSPB's second Rule 12(b)(6) motion, dismissing

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[4] *Id at 47-48.*

[5] *Id 235,236,238, 249-50.*

Count IV-A from the complaint over plaintiff's objection, and without explanation.

Gardner appealed the Rule 12(b)(6) dismissal to the D.C. Circuit asserting prima facie claims under the Privacy Act were alleged, the "law of the case" prevented multiple filings of a decided issue in the case, and he had exhausted all required administrative remedies.[6] The appeal cited D.C. Circuit decisions in Tijerina[7], Albright,[8] and Walters[9] holding allegations of "wilful or intentional" agency conduct are matters for the trier of fact. The burden of proof is on the claimant to establish by "somewhat greater than gross negligence" that the MSPB willfully or intentionally violated the Privacy Act.

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[6] *MacPherson v. IRS, 803 F.2d 479 (9th Cir. 1986)[no requirement to exhaust administrative remedies is necessary when agency records are inaccurate.].*

[7] *Tijerina v. Walters, 821 F.2d 789, 799 (D.C.1987)*[The issue of intentional or willful acts are genuine issues of material fact which can not be disposed of on summary judgment.]

[8] *United States v. Albright, 732 F.2d 181, 189 (D.C.Cir.1989)* (5 USC 552a(g)(4) imposes liability when the agency willfully or intentionally violates the Act.]

[9] *Walters v. Thornburg, 88 F.2d 870, 875 (D.C.Cir.1989) [Court remanded case for further proceedings on whether DOJ violations of the Act were "intentional or wilful" even though the underlying issue of violation of the Act could be decided as a matter of law.].*

Relying on *Nagel*[10], plaintiff also informed the D.C. Circuit that allegations based on a 5 U.S.C.§ 552a(g)(4) action and "willful or intentional" agency acts, as plead in his case, do not require exhaustion of administrative remedies .[11] Nevertheless, the court summarily affirmed the district court's Rule 12(b)(6) dismissal of Count IV-A.

IV. Whether MSPB Employees Acted Outside The Scope of Their Employment, Is A Genuine Issue of Material Fact To Be Decided By The Trier of Fact.

Plaintiff demanded a jury trial when he filed his cause for action against two MSPB employees in their individual capacities, for violating his U.S. Constitutional rights and for defamation .A19 The government disputed that the individually sued defendants were acting outside the scope of their employment by filing a Rule 12(b)(1) motion to dismiss. No answer or other responsive pleading as defined in Rule 7(a) was ever filed by the defendants.

The Attorney General pursuant to 28 U.S.C. §2679(d)(1) submitted a certification to the district court stating the MSPB employees were not acting outside the scope of their employment when they defamed plaintiff. The United States substituted itself for the individual defendants and then, like in *Gutierrez De Martinez*[12], the United States

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[10] *Nagel v. HEW, 725 F.2d 1438, 1441 (D.C.Cir.1984)*

[11] Also See *MacPherson for another exception.*

[12] *515 U.S. 417, 514-515 (1995)*

alleged the district court had no jurisdiction over the case because of its sovereign immunity in defamation actions. *Id at 419,422,423.*

The district court initially denied this Rule 12 (b)(1) motion on November 25, 1997 without opinion but presumely because a material issue of fact existed on the scope of employment issue and the U.S. Constitutional violations would be determined by a jury. A14. The court ordered the parties to file dispositive motions not to exceed 25 pages (including all exhibits and attachments) and the United States filed the exact same Rule 12(b)(1) motion previously denied despite the "law of the case.". A15. Plaintiff filed a motion for summary judgment that was denied and affirmed the D.C. Circuit.A18.

Plaintiff opposed the motion and raised this Court's decision in *Gutierrez De Martinez* which held the Attorney General's certification does **not** conclusively establish as correct the substitution of the U.S. as a defendant in a federal employee's place *Id. 419, 422-423, 430-434.* The plaintiff must have an opportunity to provide by a preponderance of the evidence that the defendants' actions were beyond the scope of their employment.[13] Despite the binding precedent set by this Court in *Gutierrez De Martinez,* the district court granted the Rule 12(b)(1) dismissal. The district court not only ignored its duty to follow this Court's binding decision but it also ignored the D.C.Circuit's decision in *Kimbro* mandating a hearing on the scope of employment issue.

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[13]*Kimbro v. Velten, 30 F.3d 1501, 1509 (D.C.Cir.1994),* cert denied, 515 U.S.1145 (1995).

Plaintiff appealed the district court's decision to the D.C. Circuit seeking a reversal of the non-conforming unpublished district court decision. However, the D.C. Circuit summarily affirmed the district court's decision in its own unpublished decision. Like the district court, the appellate court, ignored this Court's clear decision in *Gutierrez* and its own decision in *Kimbro*.

The appellate court relied on two of its own summary affirmance decisions, that were not on point, to deprive Gardner of his right to brief the appealed issues.[14] The cases relied upon by the appellate court were not dismissed pursuant to Rule 12(b)(1) but rather were lower court summary judgments made after the issues were joined by a responsive pleading and both parties presented their evidence. In the instance case , defendants never filed a responsive pleading nor was plaintiff allowed to present his evidence on the merits of his claims.[15]

The D.C. Circuit also held Gardner's claim, which was now directed at the United States, was barred by the Federal Tort Claims Act (FTCA). The appellate court also made a factual determination and found plaintiff did not state a constitutional violation. *Id.* The D.C. Circuit did not address the precedential *Gutierrez De Martinez* decision of this Court

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[14] 4 *Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C.Cir.1987) and Walker v. Washington, 627 F.2d 541 (D.C.Cir.) (per curiam), cert. denied, 449 U.S. 1994 (1980).*

[15] *Scheuer at 235, 249-250 [Premature Rule 12(b) dismissal defendant never answered the complaint.]*

and denied plaintiff's *Bivens*[16] action by its summary affirmance of the Rule 12(b)(1) dismissal. A1-2.

REASONS FOR GRANTING THE WRIT

The decision in this case is in direct conflict with this Court's decisions, the Constitutional requirement of separations of power, and the D.C. Circuit's prior ruling in this case.**A18.** When an appellate court reviews matters which Congress has not conferred jurisdiction on it to review, serious Constitutional violations occur which jeopardize the delicate balance of the role of the legislative and judicial branches of government.

28 USC §1291 is clear, appellate review only occurs when a "final decision" on all issues with respect to all parties have been rendered.[17]. The D.C. Circuit is aware of the limits of its jurisdiction as it concisely expressed in *Bruce E. Gardner v United States of America, et* al (Docket # 98-5498, D.C.Cir. 3/3/99).A18. In the related *Gardner* case, the D.C. Circuit held, "Because the district court's order is interlocutory and does not satisfy the requirements of the "collateral order doctrine," see Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978); Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541, 546 (1948); Jungquist v. Sheikh Sultann Bin Khalifa Al Nahyan, 115 F.3d 1020, 1025 (D.C.Cir.1997); this court is without jurisdiction to review the

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[16] *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) [This Court overturned district court's dismissal of a Constitutional action on jurisdictional grounds.]*

[17] *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541, 545 (1948).

challenged order." The Rule 12(b) dismissals are also interlocutory because they do not dispose of all the claims of all the defendants. Accordingly, in the instance case the appellate "court is [also] without jurisdiction to review the challenged order" since the D.C. Circuit declined to review the appealed Rule 41(b) decision.

The district court's incomplete Rule 12(b) dismissal is not a "final decision" on all the claims that ends the litigation on the merits and leave nothing for the court to do but execute the judgment [18] Only the Rule 41(b) dismissal completely disposed of all the claims of all the parties but the D.C.Circuit declined to review that ruling. Accordingly, this Court should remand this case to the D.C. Circuit to review the Rule 41(b) dismissal and hold the D.C.Circuit lacked jurisdiction to review the non-final Rule 12(b) dismissals unless it sustains the Rule 41(b) dismissal of this action..

The integrity of the legal system and the clandestine way in which Gardner was denied his right to have his claims adjudicated on the merits have national implications on a litigant's rights to due process of law. This Court has historically protected litigants' rights to have their legally sufficient claims heard on the merits.[19] In *Bell*, this court held "if allegations have any foundation in truth, the plaintiff's legal right have been ruthlessly violated" if he is not allowed to proffer evidence on his claims. *Id at 683.*

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[18] *Catlin v. United States, 324 U.S. 229 (1945).*

[19] *Conley, Scheuer, Bell.*

"The purpose of pleadings is to facilitate a proper decision on the merits."[20] Rule 12(b) motions are granted sparingly and with caution in order to make certain that plaintiffs are not improperly denied their rights to have their claims adjudicated on the merits. *Id.* Yet, in the instance case, the trial court ruled on the merits of Gardner's claims when neither the defendants' Rule 12(b)(1) nor Rule 12(b)(6) motions placed the merits of those claims in issue. A1. The district court's reliance on the *Marshall* case to decide the merits of this case is misplace because there the court was reviewing an agency's denial of medicare reimbursement benefits in its capacity as an appellate tribunal, while here, the district court had original jurisdiction over violations of the Privacy Act and the Constitution. Furthermore, the appellate court's decision to decide uncontested material allegations contained in the complaint against the non-movant plaintiff without affording him an opportunity to brief the issues or present evidence before summarily affirming the district court's decision , is clearly contrary to the accepted scope and practice of appellate review.

The factual determinations made by the appellate court are:

1. The MSPB did not "intentionally or wilfully" violated the Privacy Act; A.1

2. federal employees were not acting outside the scope of their employment and they did not violated the Constitution; A.1

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[20] *Conley at 48.*

3. Plaintiff was required to exhaust his administrative remedies with the MSPB before filing a 5 U.S.C. § 552a(g)(4) action &

4. The plaintiff did not exhaust his administrative remedies with the MSPB despite a written request to the agency to exclude the documents from its records. A.2.

But these factual issues were matters reserved for the jury. The appellate court did not have jurisdiction to make those factual determinations on issues not decided by the district court or appealed to it.[21] The issues appealed to the D.C. Circuit only concerned the district court's Rule 12(b)(1) and 12(b)(6) dismissal, neither of which required a factual determination or a decision on the merits of plaintiff's claims.

This Court[22], other Courts of Appeals[23], and the D.C. Circuit[24] itself, have previously addressed the precise important issues presented here of affording plaintiffs the opportunity to present evidence on their claims at trial. However, for some strange reason in this case, the D.C.

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[21] *Cohen* at 545 ["Appeal gives the upper court a power of review, not intervention."].

[22] *Conley at 45-46, 47-48; Scheuer 236, 238.*

[23] *Gutierrez at 423 n.3.; Exchange Nat'l Bank of Chicago v. Touche Ross, 544 F.2d 1126, 1131 (2d Cir. 1976).*

[24] *Kimbro, supra.*

Circuit determined Gardner's claims were not worthy of a decision by the jury. The court discriminated against Gardner by deciding factual issues and then after deciding those genuine issues of material fact, it summarily affirmed the district court's Rule 12(b) dismissals. The appellate court's egregious acts resulted in a decision in direct conflict with the binding decisions of this Court.[25] Accordingly, the D.C. Circuit's decision is such a far departure from the accepted and usual course of judicial proceedings in this country, as to call for an exercise of this Court's supervisory power to correct this injustice and deter other courts from employing such practices that deny litigants of their rights to prove legally sufficient claims.

I. D.C. CIRCUIT DECISION IS CLEARLY IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS.

The most compelling reasons that exists for this Court to grant this writ is the obligation of inferior courts to honor the rulings of superior courts. Here the district court did not follow the D.C. Circuit's decision in *Kimbro* and the D.C. Circuit did not follow this Court's decision in *Conley, Scheuer, Bell or Celotex.* The obligation imposed on inferior courts is so fundamental that it effects the essence of our legal system.

Also of major significant is the lower courts denial of plaintiff's access to court to adjudicate his claims on the merits and to brief the appealed issues. The lower courts' denial of this fundamental right to offer proof on a legally

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[25] *Conley, Scheuer, Bell, Celotex.*

sufficient claim , strips litigants of the protection afforded them by the Bill of Rights, by statute, and is contrary to public policy.

A. DC Circuit Lacked Jurisdiction To Review Incomplete Rule 12(b) Dismissals.

28 U.S.C. § 1291 generally provides for appeal only "from all final decisions of district court." The purpose of this statute is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when " final judgment" occurs. The effect of the statute is to disallow an appeal from any decision which is tentative, informal, or incomplete. Appeal gives the upper court a power of review not of intervention. So long as claims remain open, unfinished, or inconclusive, the appellate court does not have subject matter jurisdiction to review.[26]

In the instant case, the D.C. Circuit declined to review the final Rule 41(b) dismissal upon which it had jurisdiction but rather reviewed the incomplete Rule 12(b) dismissals for which it had no independent jurisdiction. Therefore, this case should be remanded to the D.C. Circuit to exclusively review the only issue upon which it has subject matter jurisdiction, the Rule 41(b) dismissal of the entire action with prejudice. Any other decision would constitute an assault on the separation of powers between the Legislative branch of government that creates the laws and the Judicial branch that interprets the laws. Thus, the appellate court's jurisdiction is limited to those matters in which Congress has granted it jurisdiction over the subject matter, here, the appellate court's

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[26] Cohen at 545.

jurisdiction deprives from the final Rule 41(b) dismissal which the court did not review.

B. Lower Courts Manifestly Disregarded This Court's Decisions in *Scheuer & Conley*.

This Court in *Scheuer*[27] and *Conley*[28] held a Rule 12(b)(6) review does not determine whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims. This Court also held that a complaint should not be dismissed under Rule 12(b)(6) unless it is "beyond doubt that the plaintiff can prove not set of facts in support of his claim which would entitle him to relief." *Id.* Plaintiff explicitly alleged the MSPB "intentionally or wilfully" violated the Privacy Act and asserted specific facts to support that claim. A19,28-30. The federal rules only require general or notice pleadings to establish a legally sufficient claim and the courts are required to construed these pleadings liberally. *Id. at 47-48.*

Under Rule 12(b)(1) and Rule 12(b)(6) the allegations in a complaint are deemed true. *Scheuer at 236.* However, even the most conservative reading of the complaint demonstrates plaintiff established a prima facie Privacy Act claim against the MSPB. Especially, since all the alleged facts in the complaint including the allegations of intentional and

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[27] Id at 236

[28] Id at 44-45

wilful MSPB violations of the Privacy Act are deemed true.[29] There was no evidence presented to the courts that could result in a finding other than prima facie Privacy Act claims were made by plaintiff. *Id 249-250.* Accordingly, the lower courts so departed from the accepted and usual course of judicial proceedings by denying Gardner his right to prove his claims that this Court should exercise its supervisory power.

C. The Lower Courts Were Bound By *Gutierrez*

As recent as 1995, this Court in *Gutierrez* held the Attorney General's certification on scope of employment does **not** conclusively establish as correct the substitution of the U.S. as defendant in a federal employee's place, its only prima facie evidence. *Id at 514-515.* The lower courts again ignored this Court's binding decision when it failed to allow Gardner a hearing to challenge the scope of employment issue and then dismissed his case for want of subject matter jurisdiction under Rule 12(b)(1), after the U.S. was substituted for the federal employees. The lower courts' total disregard for this Court's decision in *Gutierrez* places the lower courts decisions in direct conflict with this Court. Accordingly, the lower court's failure to subordinate itself to this Court's clear and binding decisions without explanation or any attempts to distinguish these identical cases, are such a departure from the usual and accepted judicial practice that it warrants exercise of this Court's supervisory powers.

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[29] *Scheuer at 236;* Also note as in *Scheuer* the defendant never answered the complaint and all the averments are deemed true. Rule 8(d). Id at 235, 249-50.

D. D.C. Circuit Lacked Jurisdiction To Decide Material Disputed Facts That Were Neither Previously Decided Nor Appealed.

It is well settled that summary disposition can not be used to deprive a litigant of a full trial on genuine issues of material fact or appellate review when material facts are in dispute.[30] Summary disposition deprives the appellant the opportunity to argue the merits of his claims. "Briefing on the merits should be encouraged not only because parties expect and deserve it, but because it leads to greater accuracy in decisions. Briefing helps the court to reduce as much as possible the inevitable incidence of error and confusion".[31] Here, the D.C. Circuit committed a double fault when it decided genuine issues of material facts and then summarily affirmed the dismissal, as if, those facts had been previously decided by the trial court and were no longer in dispute.

The D.C. Circuit's dual role of tier of fact and primary decision maker, are such a departure from the accepted and usual course of appellate proceedings to warrant the exercise of this Court's supervisory powers to correct a travesty of justice and maintain public confidence in the judicial system

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[30] *Pollen v. CBS, Inc 368 U.S. 464 (1962); Celotex Corp. v. Catreet, 477 U.S. 317, 323, 324 (1985).*

[31] *Commissioner v McCoy, 484 U.S.3,7 (1987).*

II. DIRECT CONFLICTS WITH D.C. CIRCUIT DECISIONS & OTHER CIRCUITS.

A. Summary Affirmance Was Inappropriate.

It is well established that summary disposition at the appellant level is appropriate when the basic facts are uncomplicated, undisputed, and the trial court's rulings rests on a narrow and clear-cut issue of law.[32] In addition, the remedy sought must be proper and the merits of the appealed claim must warrant relief to justify expedited action.[33] Here, the material facts were disputed, the dismissals were premature, and no support to justify expedited disposition was made by either defendant or the court.

The D.C. Circuit's reliance on two summary judgment cases, *Taxpayers Watchdog* and *Walker* as the basis for granting summary affirmance on the Rule 12(b) motions was misplaced, as set forth above.[34] It was also in direct conflict with Court of Appeals decisions that follow the Federal Circuit's decision in *Joshua*, where the standard of review for a summary disposition of an appeal was decided. The Federal Circuit held summary disposition:

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[32] *Carr Management, Inc. v. National Deli, Inc, 397 A.2d 914, 915 (DC 1979).*

[33] *U.S. v. Allen, 408 F.2d 1287, 1288 (D.C.Cir.1969)*

[34] *Joshua v US 17 F.3d 378,380 (Fed.Cir. 1994).*

> is appropriate when, inter alia, the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.

In the instance case, the law could not be applied until the disputed facts were decided and the D.C. Circuit had no authority to decide those disputed facts, deny briefing, and then summarily affirm the prior decision.[35] The failure to afford Gardner the opportunity to present his evidence to the trier of fact to prove his claims, is a clear violation of his rights to due process of law. Accordingly, the D.C. Circuit's misapprehension of the law of summary disposition was so contrary to the accepted practices and procedures of the judiciary, that this Court should feel compelled to intervene and exercise it supervisory authority to ensure Gardner receives due process and equal protection of the laws.

B. Law of The Case

Law of the case rules have been developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. The D.C. Circuit held in *Crocker*[36] that issues previously determined and actually decided become "the law of the case". In two separate *Laffey* cases , the D.C. Circuit required "clear error" and "manifest injustice" to exist before reversal

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[35] *Id.; Pollen; Celotex*

[36] *Crocker v. Piedmont Aviation, Inc. 49 f.3d 735 (D.C.Cir. 1995); In re Sanford Fork & Tool co, 160 U.S. 247, 255 (9185)*

of "the law of the case" could occur.[37] No clearly erroneous finding, manifest injustice, or other reasons existed or were stated by the district court for reversing the November 25, 1997 decision , two years later, on January 29, 1999. A.15. Accordingly, the district court's dismissal of Gardner's case was arbitrary and manifestly unjust. The judiciary has a vested interest in ensuring justice is administered fairly to retain the public trust and confidence. Therefore, this Court should exercise its authority to ensure the public trust in the judiciary is maintained and the use of cases, such as *Marshall*[38], do not undermine the well established legal precedent of this Court concerning the scope of Rule 12(b) review.

C. Conflicts Between The Circuits

The Privacy Act was enacted to 'protect the privacy of individuals identified in information systems maintained by Federal agencies[39] and to safeguard the public from unwarranted collection, maintenance, and dissemination of personal information contained in agency records.[40] The D.C. Circuit in *Tijerina* recognizes liability under the Act is the

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[37] *Laffey v. NW Airlines, 740 F.2d 1071, 1082 n. 18 (D.C.Cir.1984), cert denied, (1981); Laffey v. NW Airlines, 642 F.2d 578, 585 D.C. Cir. 1980).*

[38] 988 F.2d 1221, 1226 (D.C.Cir.1993).

[39] *Aquino v. Stone, 957 F.2d 139, 141 (4th Cir.1992).*

[40] *Wilborn v. Dept of HHS, 49 F.3d 597, 600 (9th Cir.1996).*

result of the agency's failure to meet its duties. *Id. at 796.* In *Albright* the D.C. Circuit recognized that the Act imposes liability where the agency "commit[s] the act without grounds for believing it to be lawful [or] flagrantly disregard[s] others' rights under the Act. *Id. 189.* However, here, the D.C. Circuit does not recognize any rights of the plaintiff under the Privacy Act.

Plaintiff alleged the MSPB willfully and intentionally violated his rights under the Act. A19,29-30. The 4th Circuit in *Scrimgeouri*[41] held intentional or wilful conduct is a matter for the trier of fact to determine.. The D.C. Circuit *in Tijerina* held genuine issues of material fact can not be disposed of summarily *Id. at 799.* However, the D.C. Circuit in conflict with itself and those appellate courts that follow its decisions and the 4th Circuit decision in *Scrimgeouri,* are in direct conflict with the decision rendered in this case.

It appears Gardner has been singled out and not afforded the equal protection of the law Congress promulgated to protect him and other U.S. citizens' privacy. Accordingly, if the lower courts can deny Gardner access to court to offer evidence on his bona fide privacy right claims because he's acting pro se, he's an attorney, he's contesting his arbitrary IRS discharge, he's an African-American, or any other arbitrary reason, then, these same protections enacted by Congress can be denied any citizen at any time by the lower courts. Gardner's "legal rights have been ruthlessly

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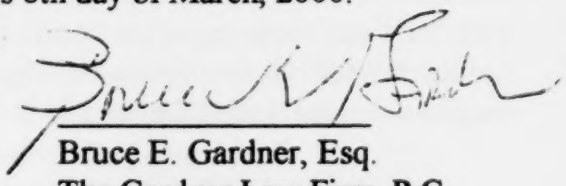
[41] *Scrimgeour v. IRS, 149 F.3d 318, 324 (4th Cir. 1998).*

violated"[42] and it is incumbent upon this Court to ensure that Gardner and all citizens are afforded equal protection under the law and their privacy is protected!

CONCLUSION

This petition for a writ of certiorari should be granted. This case should be remanded to the D.C. Circuit to review the merits of the Rule 41(b) dismissal of Gardner's entire complaint based upon one medical absence. Alternatively, this Court should decide the important issues presented.

Respectfully submitted this 8th day of March, 2000.



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(202) 271-0552

[42] Bell at 683.

United States Court of Appeals
For The District of Columbia Circuit

No 99-5089 **September Term, 1998**
96cv01467

Bruce E. Gardner,
Appellant,

v.

United States of America, et al.,
Appellees

United States Court of Appeals
For District of Columbia Circuit
Filed
Aug 4, 1999
CLERK

BEFORE: Wald, Ginsburg, and Garland, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance of the claims involving the Merit Systems Protection Board (Counts-A, I-B, and IV-A), the response thereto, and the lodged reply; and the motion for leave to file the lodged reply and the opposition thereto, it is

ORDERED that the motion for leave to file be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the motion for summary affirmance be granted and that the district court's dismissal of counts I-A, I-B, and IV-A be summarily affirmed. The merits of the parties' position are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C.Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (Per curiam), cert. denied, 449 U.S. 1994 (1980). As to Counts I-A and

I-B, the government correctly certified that the employees of the Merit Systems Protection Board ("MSPB) named as defendants were acting within the scope of their employment when they wrote an official agency decision, and therefore Gardner's tort claims can only be brought against the United States under the Federal Tort Claims Act ("FTCA"). See 28 U.S.C.§ 2679(b); Simpkins v. District of Columbia gov't, 108 F.3d 366, 370 (D.C.Cir. 1997). Because the FTCA does not waive the United States' sovereign immunity for claims based on libel or slander, appellant's claims were not cognizable under the FTCA. See 28 U.S.C. § 2680(h). Nor do appellant's claims state a constitutional violation. See Simpkins, 108 F.3d at 372. In addition, the district court properly dismissed Count IV-A. To the extent appellant sought damages under the Privacy Act, the MSPB did not act in a manner that was intentional or willful. See 5 U.S.C.§ 552a(g)(4); Deters v. United States Parole Comm'n, 85 F.3d 655 (D.C. Cir. 1996). To the extent appellant sought the amendment of records, he failed to exhaust his administrative remedies, a prerequisite to filing a complaint in district court. See Dickson v. OPM, 828 F.2d 32, 40 (D.C.Cir. 1987). Nor did appellant state a claim for a violation of 5 U.S.C.§ 552a(e)(7). See Nagel v. U.S. Dep't of Health, Educ. & Welfare, 725 F.2d 1438, 1441 (d.Cir. 1984). Because the district court correctly dismissed these three counts on the merits, it is not necessary to consider whether dismissal was also appropriate because of appellant's failure to appear at the motions hearing.

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam
Initialed, Initialed, Initialed

EXCERPT FROM DECISION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, Plaintiff,	)	
	)	Civil Action No. 96-1467
v.	)	(EGS)
	)	
UNITED STATES, et al;., Defendants.	)	**FILED**
	)	**JAN 29 1999**
	)	Nancy Mayer-\Whittington. Clerk
	)	U.S. DISTRICT COURT

MEMORANDUM OPINION & ORDER

EMMET G. SULLIVAN, UNITED STATES DISTRICT JUDGE.

INTRODUCTION

On January 21, 1999, plaintiff filed a motion to continue the motions hearing that was scheduled for January 27, 1999. In his motion and during a telephone conference with opposing counsel on January 22, 1999, plaintiff communicated to the "Court that he was suffering from the flu and had slightly burned his hands while extinguishing a

fire. The Court denied plaintiff's motion during the telephone conference, but only after considering that several of the defense counsel reside in the State of California and had incurred substantial costs in traveling to Washington, D. C for the hearing and after determining that plaintiff seemed healthy enough to appear in court.

During the telephone conference, the Court noted that plaintiff's injuries did not require him to seek the medical services of a doctor or travel to a hospital. Plaintiff did not sound congested or wheezy and, in the view of the Court, was not unclear in his thoughts. In an effort to accommodate plaintiff, the Court told plaintiff that he could remain seated during the arguments and that adequate water would be provided for him at counsel table. At that time, plaintiff indicated he would be present in court. Thereafter, the Court decided to issue an oral ruling on pending motions and dispense with argument.

When plaintiff failed to appear for argument on January 27, 1999, the Court stated that it would issue written rulings on all motions and that, in addition to other reasons for dismissal plaintiff's complaint would be dismissed pursuant to Fed.R.Civ. P. 41(b) for failure to prosecute. Later that evening, plaintiff telephoned the Court and stated that he was on medication that caused him to oversleep and miss the motions hearing. Despite plaintiff's contact with the Court, the Court dismissed the case pursuant to Rule 41(b) as well as for the reasons set forth below.[1]

FACTUAL BACKGROUND

Plaintiff filed this complaint on June 25, 1996, which brings claims against the United States, the Department of the Treasury, the Internal Revenue Service ("IRS") and ten of its

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[1]Plaintiff's note-The court was presented with a doctor's note on January 28, 1999 with a motion to reset the hearing date. The court rejected the motion and doctor's note from the record by returning them to plaintiff.

current or former employers, the State of California and one of its agencies, and the Merit Systems Protection Board and two of its judges. Plaintiff seeks relief under various legal theories, including constitutional violations, violations of the Privacy Act, violations of 26 U.S.C.§ 6103, which governs the confidentiality of tax returns and "return information," Texas defamation law, and the Whistleblowers' Protection Act.

Plaintiff's complaint stems from the termination of his employment as a tax attorney for the IRS. The IRS claims that it fired plaintiff's because of the number of unsupportable positions taken by him on his federal tax returns, his failure to file Maryland to Maryland income tax returns[2], and his failure

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[2]Plaintiff's note-No support for this erroneous statement is contained in the record nor was it ever alleged by the IRS.

to comply with California motor vehicle laws[3]. Throughout the process of determining whether grounds existed for terminating plaintiff's employment and of defending the IRS' position with regard to plaintiff's request for unemployment benefits, the IRS had access to and disclosed plaintiff's's tax return information. The gravamen of plaintiff's complaint is that the disclosures violated various laws.

DISCUSSION

I. Legal Standard

Defendants have filed motions to dismiss all of plaintiff's claims pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(2), and 12(b)(6). A motion under 12(b)(1) "presents a threshold challenge to the court's jurisdiction." Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987). In ruling on a motion to dismiss for lack of standing pursuant to Fed. R. Civ.P

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[3]Plaintiff's note- the court excluded the correct phrase "timely comply" from its statement.

12(b)(1), the Court must accepted the allegations contained in the complaint as true, see, e.g., Gibbs v. Buck, 307 U.S. 66 (1939); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977), and must construe the complaint in favor of the complaining party. See Warth v. Seldin, 422 U.S. 490, 501 (1975); Haase, 835 F.2d at 906 (quoting Warth).

Several defendants have moved for dismissal pursuant to Fed.R. Civ. P. 12(b)(2) for lack of personal jurisdiction. In order for this Court to maintain personal jurisdiction over a non-resident defendant, jurisdiction must be proper under the District of Columbia long- arm statute and consistent with the demands of due process. See United States v. Ferrara, 54 F.3d 825, 828 (D.C. Cir. 1995): Crane v. Carr, 814 F.2d 758, 762 (D.C.Cir. 1987). The burden is on the plaintiff to establish that this Court has personal jurisdiction over defendants and allege specific facts upon which personal

jurisdiction may be based. See Blumenthal v. Drudge, 992 F. Supp. 44, 53 (D.C.C. 1998).

Finally, under Fed.R.Civ.P. 12(b)(6), a motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957). "Because a court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." Marshall Co. Health Care Auth.v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993); cf. Neitzke v. Williams., 490 U.S. 319, 327 (1989) (noting that a party may lose on a 12(b)(6) motion whether his claim "is based on an outlandish legal theory or a close but ultimately unavailing one"). The court must also construe the complaint in favor of the complaining party. See Warth, 422 U.S. at 501.

II. Motion to Dismiss by Defendants United States, Department of Treasury, and Internal Revenue Service.

II. Motion to Dismiss by State of California [page 19] (sic)

III. Motion to Dismiss by Defendant Merit Systems Protection board ("MSPB)

Defendants Merits Systems Protection Board ("MSPB"), Ben L. Erdreich, and Antonio C. Amador, move to dismiss Counts 1.A, 1.B, and 4.A, which are claims for defamation and libel and for violations of various provisions of the Privacy Act. Defendants argue that plaintiff's claims for defamation and libel should be dismissed under the Federal Tort claims Act and that plaintiff cannot attack an administrative record or decision through a Privacy Act claim.

A. Motion to Dismiss Counts 1.A and 1.B

Title 28 §2679(d)(1) provides that "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claiming a United States district court shall be deemed an action against

the United States the provision of this title and all references thereto, and the United States shall be substituted as the party defendant." Here, the Attorney General has certified that defendants Erdreich and Amador were acting within the scope of their employment. See Certification of John Bates, attached to MSPB Defendants' Motion to Dismiss. Therefore, Counts 1.A and 1.B should be dismissed against the individual defendants, and the United States should be substituted. Once the United States is substituted, the Federal Tort Claims Act is invoked, and the FTCA bars all claims sounding in libel and slander and also requires the plaintiff to exhaust his administrative remedies before filing suit. Plaintiff has not properly presented his claims to the MSPB. As a result, defendants' motion to dismiss Counts 1.A and 1.B pursuant to Fed.R.Civ. 12(b)(1) is GRANTED.

B. Motion to Dismiss Count 4.A

In Count 4.A, plaintiff asserts that the MSPB has violated various provisions of the Privacy Act and seeks to have the records of the MSPB amended. Defendant argues that plaintiff has not exhausted his administrative remedies and that the United States is the only proper party in action for violation of non-disclosure provisions. "A Privacy Act plaintiff...must exhaust his or her administrative remedies prior to bringing an amendment suit." Hill v. U.S. Air Forces, 795 F.2d 1067, 1069 (D.C.Cir. 1986). Plaintiff has not properly presented his claims to the MSPB for amendment, and thus defendant's motion to dismiss is GRANTED. Moreover, plaintiff has not met his burden of proof in demonstrating that MSPB's conduct was "intentional or willful." 5 U.S.C.§ 552a(g)(4)(1998); see also Walters v. Thornburg, 888 F.2d 870, 875 (D.C.Cir. 1989). Therefore, defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is GRANTED.

IV. Motion to Dismiss by IRS Defendants [page 24]

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are GRANTED and the above-captioned case is DISMISSED WITH PREJUDICE.

_____ -S-

DATE EMMET G. SULLIVAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER	)	
Plaintiff,	)	Civil Action No.
v.	)	96-1467 (EGS)
	)	
UNITED STATES OF AMERICA,	)	**FILED**
et al.	)	**DEC 10 1997**
Defendants.	)	NANCY MAYER-WHITTINGTON, U.S. District Court

ORDER

On November 25, 1997, this Court denied all pending motions in this case and ordered that dispositive motions be filed by December 23, 1997. The court *sua sponte* orders that pursuant to Fed.R.Civ.P.12(a)(4) the defendants are not required to file their answers until resolution of these dispositive motions.

12/9/97 -S-

DATE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER Plaintiff, v. UNITED STATES OF AMERICA, et al. Defendants.	)	) Civil Action No.) 96-1467 (EGS))) **FILED**) **NOV 26 1997**) NANCY MAYER-WHITTINGTON, U.S. District Court

ORDER

The Court hereby denies all pending motions without prejudice. Parties are directed to file any potentially dispositive motion, not to exceed 25 pages *(including* exhibits, appendices, and attachments), by no later than December 23, 1997. Any oppositions shall not exceed 10 pages (including exhibits, appendices, and attachments) and shall be filed by no later than January 20, 1998.

11/25/97
DATE

-S-
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For The District of Columbia Circuit

No. 99-5089 **September Terms, 1999**

Bruce E. Gardner, **96cv01467**
Appellant

v.

United States of America, et al.,
Appellees

BEFORE: Wald, Ginsburg and Gardland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed September 27, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: -s-
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For District of Columbia Circuit
FILED
OCT 26 1999
CLERK

BRUCE E. GARDNER
P.O. Box 6183
Washington, D.C.20044-6183
(202) 271-0552

EXCERPT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER,
1000 6TH Street S.W.
Washington, D.C. 20024,
Plaintiff.

v..

UNITED STATES OF AMERICA
Washington, D.C. ...

Merit System Protection Board
1120 Vermont Ave. Ste 806
Washington, D.C. 20419
&
IN THEIR INDIVIDUAL CAPACITIES

Ben L. Erdreich
1120 Vermont Ave Ste 806
Washington, D.C. 20419

Antonio C. Amador
1120 Vermont Ave Ste 806
Washington, D.C. 20419
Defendants.

} Civil Action No.
} 1:96CV01467 (EGS)
} Sullivan, J.
}
} VIOLATIONS OF:
} 1st, 4th, 5th
} Amendments USCA
}
}DEFAMATION ACTION
}CALIFORNIA CIVIL CODE
}(§44, §45, §45a, §46)
}
}LIBEL-TEXAS CIVIL STATUTE
} (§ 73.001 et.seq)
}
}PRIVACY RIGHT ACT
}VIOLATIONS
} (5 USC §552a(b))
} (5 USC §552a(e))
} (5 USC §552a(g)(1))
} (5 USC §552a(g)(4))
}
}DEMAND FOR JURY TRIAL

PLAINTIFF'S AMENDED COMPLAINT FOR VIOLATIONS OF THE LAWS OF THE UNITED STATES, STATE OF CALIFORNIA AND THE STATE OF TEXAS.

12. The suite arises under the 1st, 4th, and 5th Amendments of the United States Constitution for abridgement of freedom of expression, violation of reasonable expectation of privacy, illegal search and seizure, and taking of property and liberty without due process of law.

13. This suit arises under the laws of the Internal Revenue Code for the unauthorized disclosures of Plaintiff's tax returns and tax return information in violation of 26 U.S.C. § 6103(a) and 26 U.S.C. § 7431(c).

14. This suit arises under the laws of the Privacy Rights Act of 1974 pursuant to 5 U.S.C. § 552a(g)(1)C) and 5 U.S.C.§ 552a(g)(4) for wilfully or intentionally failing to maintain records concerning Plaintiff with such accuracy, relevancy, and completeness as was necessary to assure fairness in determinations relating to his qualifications, character, right, or opportunities of, or benefits to him made

on the basis on such records, and which resulted in adverse determinations to him based on those records.

15. This suit arises under the laws of the Privacy Rights Act of 1974 pursuant to 5 U.S.C. §552a(g)1)(D) and 5 USC§552a(g)(4) for wilfully or intentionally failing to comply with any other provisions of 5 U.S.C. § 552a, in such a way as to have an adverse affect on Plaintiff. ...

COUNT I.A
(EDREICH'S defamatory statements accused plaintiff of commission of tax crime of not filing his federal tax returns.)

51a. Incorporate paragraphs 1 through 51 in this Count by reference.

51b. ERDREICH wilfully prepared, wrote, or approved or caused to be prepared written or published the following defamatory statement concerning Mr. Gardner:

I. "The agency based its removal action on charges that appellant failed to file Federal income tax returns."

51c. ERDREICH's wilful defamatory statement was contained in the Factual Background section of his July 20, 1995 Opinion and Order. Cal Civ. 45a.

51d. ERDEICH's wilful defamatory statement was republished numerous times including republication to individuals, legal on line computer services, and legal books.

51e. The extent of the republication covers California, Texas, Illinois, Washington, D.C., New York, the remaining 50 States and the world.

51f. ERDREICH's wilful defamatory statement was seen or read by countless persons.

51g. ERDREICH's wilful defamatory statement was done intentionally to deprive Mr. Gardner of a federal property right and to place him in a false light.

51h. EDREICH's defamatory statement adversely affected Mr. Gardner's reputation an character.

51i. ERDREICH's defamatory statement is libelous on its face. Cal.Civ.45a.

51j. ERDREICH is liable for compensatory damages, special damages, and punitive damages in the minimum amount of $5 million for his defamatory statement and the subsequent republication.

COUNT I.B
(EDREICH'S defamatory statements accused plaintiff of commission of tax crime of not filing his federal tax returns.)

52. Incorporate paragraphs 1 through 51j in this Count by reference.

52a. AMADOR wilfully prepared, wrote, or approved or caused to be prepared written or published the following defamatory statement concerning Mr. Gardner:

I. "The agency based its removal action on charges that appellant failed to file Federal income tax returns."

52b. AMADOR's wilful defamatory statement was contained in the Factual Background section of his July 20, 1995 Opinion and Order.

52c. AMADOR's wilful defamatory statement was republished numerous times including republication to individuals, legal on line computer services, and legal books.

52d. The extent of the republication covers California, Texas, Illinois, Washington, D.C., New York, the remaining 50 States and the world.

52e. AMADOR's wilful defamatory statement was seen or read by countless persons.

52f. AMADOR's wilful defamatory statement was done intentionally to deprive Mr. Gardner of a federal property right and to place him in a false light.

52g. AMADOR's defamatory statement adversely affected Mr. Gardner's reputation an character.

52h. AMADOR's defamatory statement is libelous on its face. Cal Civ. 45a.

52i. AMADOR is liable for compensatory damages, special damages, and punitive damages in the minimum amount of $5 million for his defamatory statement and the subsequent republications.

COUNT IV.A
(MSPB wilfully violated the privacy right act)

100a. Incorporate paragraphs 1 through 100 in this Count by reference.

100b. MSPB maintains and controls a system of records.

100c. Mr. Gardner's records are contained in the MSPB's system of records which are retrievable by an identifier such as a docket number.

100d. The system of records maintained by the MSPB contain false, defamatory, and inaccurate records about Mr. Gardner including the defamatory records made by

ERDREICH, AMADOR, and the MSPB that were wilfully placed in their system of records.

100e. MSPB's system of records contain information on how Mr. Gardner exercised his 1st amendment right to freedom of expression which were wilfully or wantonly maintained by the MSPB.

100f. Mr. Gardner did not consent to the wilful inclusion, maintenance, or disclosures of the false, defamatory, or inaccurate records in the MSPB' system of records.

100g. MSPB's creation, retrieval, extraction, or disclosure of the false records of Mr. Gardner it wilfully and intentional maintained and released adversely affected Mr. Gardner's property rights.

100h. MSPB' false, defamatory, and inaccurate records that adversely affected Mr. Gardner's federal state property rights were the proximate cause of his injuries.

100i. MSPB wilfully or intentionally violated the privacy right act based on the records contained in its system of records of Mr. Gardner. 5 U.S.C.§ 552a(e)(5),(7).

100j. MSPB is labile for damages for each violation of the ACT and all multiple violations in the minimum amount of $1,000 each.5 USC§ 552a(g(1)(C) &(D); §552a(g)(4).

100k. MSPB must be ordered to remove all false, defamatory, and inaccurate records of Mr. Gardner from their system of records including his 1990 tax returns, 1990 tax return information, and all other tax returns or return information to prevent further unauthorized disclosures of his personal tax records. 5 U.S.C.§ 552a(g)(1),(2)(A), §552a(e)(1), 552a(g)(1)(D).

September 19, 1996

-s-
Bruce E. Gardner
P.O. Box 6183
Washington, D.C.
20044